STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2002
V	No. 221869 Wayne Circuit Court
DANIEL H. HUGHES, Defendant-Appellant.	Criminal Division LC No. 98-009485

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of first-degree home invasion, MCL 750.110a, assault with intent to do great bodily harm less than murder, MCL 750.84, animal torture/killing, MCL 750.50b, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender-third, MCL 769.11, to prison terms of twelve to twenty years for the assault conviction, and three to eight years for the animal torture conviction, to be served concurrently following the completion of defendant's twenty-five to forty year sentence for home invasion, which runs consecutively to the two year felony-firearm sentence. We affirm.

I. Facts and Proceedings.

Defendant's convictions arose out of charges that defendant broke into the home of Michael Berro, husband of defendant's former girlfriend, killed complainant's dog, and subsequently attacked and shot Berro. Berro, a Redford Township police officer, testified that on August 7, 1998, at approximately 1:15 p.m., he arrived home, set down his briefcase containing his duty weapon, drivers license and police identification, among other things, and then noticed blood stains on the floor. While searching the house to determine the origin of the bloodstains, Berro was attacked by an intruder who sprayed him with pepper spray. Berro lunged at the intruder and both of them fell into the dining room table. Berro was able to get up and headed toward the front door of the house to seek assistance when he was shot twice in the middle of his back. Subsequently, the Berros' dog was found dead in the basement of the house, with a gunshot wound to the head. The dog's head was also wrapped in a plastic bag.

After Berro was taken to the hospital he was interviewed by the police and provided a description of the intruder. Berro told the police the intruder looked familiar but that he couldn't quite place him. Berro's wife was interviewed, and she hypothesized that defendant could have

been the attacker, as he had been violent to her in the past and fit the description given by her husband. Berro was reinterviewed, and he told the police he was 99% sure defendant was the attacker. The police were also informed that a citizen had reported noticing an individual in the area at the time of the incident that matched the description given by Berro, and that that person had left the area driving in either a white, silver, or light blue Ford Tempo with a license plate containing the letter U. A LEIN check revealed that defendant owned a gray 1989 Ford Taurus, license plate MVD 523. Based on the information obtained, the police waited at defendant's house and arrested him at 2:45 a.m. the following day.

Following his arrest, defendant was interviewed by Michigan State Police Detective Sergeant Steven Robinson. At trial, Robinson testified that defendant admitted that he had had a relationship with the victim's wife in the past, and that while he "did not know why he had" done so, he had gone to Berro's home on the day in question. Robinson also testified that defendant stated he wore black clothing when he went to the house, and that he forced the door of the house open so that he could enter the house. Robinson further testified that defendant told him that before he went into the Berro's home he purchased a knife and two cans of mace, and that along with these items he also took a .38 caliber revolver to the home with him. Robinson further testified that defendant indicated he was also carrying a blue bag with a change of clothes at the time he broke into the house. According to Robinson, defendant admitted killing Berro's dog, and told him about his altercation with Berro. Robinson testified:

> [Defendant] stated that when [the victim] had tackled him, and he fell against the dining room table, that this revolver fell out of his waistband next to his hand. [Defendant] stated that [the victim] ran to the front room, and he thought that he was possibly going for a gun. And that he shot him, his words, in his back. He said [he] was not sure that he had hit him, but he thought he had hit him. He stated at this point, he grabbed the officer's briefcase when he had come in to the house had [sic] placed the briefcase on the couch. He grabbed the briefcase and basically fled the house through a kitchen window. [Defendant] then stated he walked hurriedly . . . . to his Lincoln because he did not want to draw attention to himself.

Robinson also testified that defendant stated during the interview that there had been a postal truck in the area and that "it was possible that a postal employee may have seen him leave." A postal employee testified at trial that, at the time of the incident, he had observed a man dressed in black, carrying a "couple of bags, suitcases or briefcases," and using a blue towel to hide his face.

The police obtained a search warrant for defendant's home. During the search of defendant's home, the police found a video tape about assaults on police officers in defendant's VCR, Berro's briefcase which contained Berro's gun and badge, and a knife, car keys, and payroll checks also belonging to Berro. Police also found a .38 caliber revolver, live rounds and spent casings for the revolver, a blue bag, blue towels, black clothing and a tennis shoe. The tennis shoe not only matched impressions taken from the crime scene, but also contained blood. In addition, an examination of a slug recovered from the crime scene revealed that the bullet had been fired from the .38 caliber revolver found at defendant's home.

Before trial, defendant sought suppression of his confession and the search warrants. The trial court conducted a *Walker*[1] hearing on defendant's claim that his statement was involuntary. During this hearing, Robinson testified that defendant appeared to be coherent, intelligent, alert and was given his *Miranda*[2] rights, that defendant appeared to understand the questions being asked and that defendant never requested an attorney until the conclusion of the interview. Robinson also testified that defendant did not appear to be deprived of sleep and that it did not appear as if defendant was intoxicated. Robinson further testified that defendant did not complain about anything during the interview and that he was offered an opportunity to use the bathroom, as well as given water and a candy bar.

At the conclusion of the *Walker* hearing, the trial court found that defendant was very well educated, extremely intelligent, and that he had been advised of his *Miranda* rights. The trial court also found that defendant had not been deprived of food or sleep and that defendant's own testimony established that he had not requested a blanket, medical attention or food. The trial court further found that the delay in defendant's arraignment had not been excessive or an effort to extract an involuntary statement from defendant. The trial court also rejected defendant's claim that he had requested an attorney. Based on all of these findings, the trial court denied defendant's motion to suppress his confession.

The trial court also denied defendant's motion to suppress the search warrants. In denying the motion, the trial court found that defendant had failed to establish the necessity of a *Franks*[3] hearing to determine the accuracy of the affidavit, and that because the car "which they say was probably involved" was at defendant's home, it was reasonable for the police to search defendant's home for fruits of the crime. Defendant argued with the trial court that a *Franks* hearing was necessary, but defendant's counsel admitted that she "did not believe there was any basis for a *Franks* hearing."

At trial, defendant, who represented himself,[4] did not testify. Instead, he attempted to impeach the testimony and credibility of the prosecution's witnesses through both cross-examination and the calling of his own witnesses. Following defendant's case-in-chief, both parties gave their closing arguments to the jury, the trial court instructed the jury and the jury was excused for deliberations. After deliberations began, the jury informed the court by note that it had the following two questions: "[d]o the police have to take fingerprints of evidence found in suspect[']s (or should they), and "[c]an evidence be moved if you have a search warrant?" In response to these questions, the trial court conferred with the prosecutor, defendant, and stand-by counsel.[5] The prosecutor opined that the questions should be answered "no" and "yes" respectively and the trial court noted that it believed the jury was asking a legal not a factual question. Defense counsel disagreed, stating:

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

[4] Defendant's previous attorney acted as stand-by counsel during the trial.

[5] A substitute stand-by counsel was present in the courtroom, while defendant's original stand-by counsel was on the telephone with the substitute counsel.

That's not the way I interpreted that. They're not asking a legal question. They're asking may as a matter proper [sic] police procedure should they take fingerprints on items in a house. And, I think we're just opening a can of worms by you giving them answers to those questions. I think the safest way to deal with this is just to tell them to rely on their collective memory of the evidence in the case, and the previous instructions that you're given, and have them continue to deliberate.

The trial court responded that while it would remind the jury to use its memory and the court's previous instructions, the trial court also indicated it had a duty to answer the jury's questions. Defendant then informed the trial court that it wanted the question answered by having the trial court state that "although police may not be under an obligation to take fingerprints, that they could have or should have." However, because neither defendant nor defense counsel provided the trial court with a legal basis for telling the jury the police should have fingerprinted the evidence, the trial court instructed the jury as follows:

The Court. Good afternoon, ladies and gentlemen.

I received a note that said "[d]o the police have to take fingerprints of evidence if found in suspect's home?"

That's a question, is that right?

The Jury. Yes.

The Court. You want to know if they have a legal obligation to do that?

The Jury. Yes.

The Court. The answer is no. The legal answer is no.

Now, ladies and gentlemen, I want to tell you something. There's another part of this, that there's a parenthesis and then it says "or should they" – is that a question, too?

Juror No. 12. Yes. That's a question.

The Court. There's no legal requirement that they do that, okay. Does that answer that question?

Juror No. 12. Yes.

The Court. Now, there's another question – [c]an evidence be moved if you have a search warrant?" Is that your second question.

Juror No. 12. Right.

The Court. The search warrant is a court order directing the police to go to a particular place named in the warrant, not only authorizing the police to go in

> and look for objects, but directing them to seize object --- and to seize means to take custody or possession. So they're supposed to look and take them.
>
> So when this says "[c]an evidence be moved," that what they're supposed to do is seize it, take it. So, if that's what you mean by move that what they're supposed to do.
>
> The search warrant is a court order from the Court saying to the police you go to a particular location, you look for the objects that are in the warrant, you get them, and take them out of there. That's what the search warrant is. That's a court order telling the police to do that type of thing.

At that point, juror number twelve started expounding on the original question that had been asked:

> . The question was, to put it in more detail, once the evidence is found can it be moved from one place in the home to the other place in order to take picture or look inside or whatever, can it be moved around and take pictures of it where it's moved to from the original place it was found from?

The trial court then answered the question by stating:

> Once the police have custody of it, once they've seized it, yes. They're not supposed to – let's say they find something under a cup, like a piece of paper under a cup, like a microdot, you know like the F.B.I. or C.I.A., that's what the order does, that's the authorization to do that. That's what a search warrant is, it's court authorization to do those things. That's what it is. That's what a search warrant is. You've got those in evidence.
>
> Now, here's something else I want to tell you. I know you didn't ask me any questions about this but I want to tell you.
>
> Let me say it like this. As I told you a hundred times – and I don't want to keep beating a dead horse – but, it's important that you understand that you're to base your decision based on the evidence, what's in evidence, you see. And, that search warrant is in evidence, so you can read that – you know what I mean? You've asked for the evidence. You can read it and you can take a look at that. There's no prohibition against that. You've asked for them. You don't have to. You do what you want. You're the trier of fact. But, you have that to look at.
>
> Does that answer the question? Are those two questions answered now?
>
> *The Jury*. Yes.

The trial court then informed the jury that if it had anymore questions it should "just write a note." Nonetheless, the following colloquy ensued:

Juror No. 9. I've got a question.

The Court. Is it separate from what's on this paper?

Juror No. 9. Wouldn't fingerprints and DNA be very important part of this investigation?

The Court. What's important, I think, is that the jury collectively – what your job is to do is to base your decision based on the evidence that's been presented in court. You have to go on the evidence, rely on your collective memories and go on the evidence. And you're free to deliberate and look at all the evidence, and then rely on your collective memories for that because that's why we have twelve jurors because one person may not remember everything. So that's what I think is the best way to do it.

And the evidence – and I'll define it for you is the sworn testimony of the witnesses, Exhibits offered and received into evidence and anything else I told you during the course of the trial that was evidence. Do you understand that?

The Jury. Yes.

The Court. Does that answer your question.

The Jury. Yes.

Following this colloquy, the jury was sent to the jury room in order to continue deliberations. The prosecutor then expressed satisfaction with the instructions the trial court provided the jury. The trial court then asked defense counsel if, "other than the objection" already put on the record, was there anything else he wished to add. Defense counsel responded by stating:

> I think you answered that question adequately, very well. That's the way I would have answered it if I were in your shoes. The only concern I know that [defendant] has is he wanted you to tell them that the police could have fingerprinted.

Defendant then added that he wished the trial court would have informed the jury that the police could have fingerprinted the evidence if they had wanted.

Following deliberations, the jury found defendant guilty of first-degree home invasion, MCL 750.110a, assault with intent to do great bodily harm, MCL 750.84,[6] animal torture/killing, MCL 750.50b, and felony-firearm, MCL 750.227b, and the trial court sentenced him to prison. This appeal now ensues.

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[6] Defendant had actually been charged with assault with intent to kill, MCL 750.83, but the jury found defendant guilty of the lesser-included offense of assault with intent to do great bodily harm.

II. Analysis

On appeal, defendant first argues that his statement to the police following his arrest was involuntarily made and that it therefore should have been suppressed. We disagree. A lower court's factual findings in a suppression hearing are reviewed for clear error and will be affirmed unless the reviewing court has a definite and firm conviction that a mistake has been made. *People v Cheatham*, 453 Mich 1, 29-30, 44; 551 NW2d 355 (1996); *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Admission of a confession into evidence depends on whether, under the totality of the circumstances, the statement was voluntarily made, i.e. whether "the confession is the product of an essentially free and unconstrained choice . . . or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

Defendant's claims first that his statement should have been suppressed because it was not electronically recorded. In *People v Fike*, 228 Mich App 178, 184; 577 NW2d 903 (1998), this Court held that due process did not require electronic recordings of custodial confessions. Thus, defendant's claim in this regard lacks merit. Defendant next argues that his statements should be suppressed because his repeated requests for counsel were ignored by the police. The trial court, however, expressly found that defendant had not requested counsel during his interview with Detective Robinson. Because the testimony on this issue was conflicting, we defer to the trial court's superior ability to judge the credibility of the witnesses before it. In reviewing such credibility findings of a trial court, we will not reverse the trial court's factual findings unless they are clearly erroneous. *People v Bender*, 208 Mich App 201, 227; 527 NW2d 66 (1994). See also *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 778 (2000). Here, the record does not lead us to conclude that the trial court clearly erred when it ruled that defendant had not requested an attorney. *Bender*, *supra*.

In addition to the above claimed procedural deficiencies, defendant also argues that the record as a whole demonstrates that his statement was not voluntary. Again, a trial court's factual finding that a statement was voluntary is given ample deference by this Court, and will not be reversed unless it is clearly erroneous. *Snider*, *supra* at 417. Here, the trial court found the statement was voluntary and not coerced because defendant was an intelligent, well educated adult man who had been advised of his *Miranda* rights, the questioning was not repeated or prolonged, defendant was neither intoxicated nor deprived of food or sleep during his interview, and defendant never asked for a blanket, food or drink. See *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The trial court also concluded that there was not an unreasonable delay between defendant's arrest and arraignment. See *People v Whitehead*, 238 Mich App 1, 2; 604 NW2d 737 (1999). The record supports the trial court's factual findings and conclusion that defendant's statement was voluntary, and we reject defendant's claim that the trial court erred. *Snider, supra.*

Defendant also argues that the affidavit in support of the first search warrant included false statements regarding the type of vehicle observed at the crime scene by an unnamed witness, and that therefore, the trial court should have held a *Franks* hearing on his motion to suppress the search warrants. We disagree. Even if the affidavit contained false statements, suppression is only required if the false information was necessary to establish probable cause. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). Although the trial court relied on information defendant claims is false in declining to hold a *Franks* hearing, the

affidavit also contained the victim's statement that he was "ninety nine percent sure" defendant was the man who shot him. Because the identification of defendant alone is enough to establish probable cause that evidence of the crime would be in defendant's house, the challenged information was not necessary for the issuance of the warrant, see *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). Thus, we affirm the trial court's correct decision to deny defendant's request for a *Franks* hearing, even if the decision was made for the wrong reason. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

Finally, defendant argues that the trial court distorted the instruction on reasonable doubt when, in answer to a jury question, it told the jury that the jury should base its decision on the evidence but did not tell the jury it could also consider the lack of evidence in the case as well. Because defendant did not raise this challenge below, our review is limited to plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). In *People v Cooper*, 236 Mich App 643, 649; 601 NW2d 409 (1999), this Court, quoting *People v Longaria*, 333 Mich 696, 699; 53 NW2d 685 (1952), stated that "[t]he defense is not entitled of right to have the judge comment upon the evidence or point out the weak points in the State's case so far as they involve question of fact and not of law." (Emphasis omitted.) Since defendant's contention that there was a lack of evidence to convict him pertains to questions of fact, we find no plain error affecting defendant's substantial rights in the trial court's reasonable doubt instruction. *Carines, supra.*

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper